LEGAL OPINION

Treaty-Making by Afterthought: Can the EU-Mercosur Association Agreement Be Saved by the Joint Instrument?

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Content

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I. Introduction

The conclusion of EU Trade and investment agreements has increasingly become politicised. An important set of criticisms relates to the lack of genuine legal mechanisms ensuring the commitments to sustainability and emission reduction.[2] The unqualified endorsement of trade liberalisation and investment protection has come under pressure.[3]

Mainstream economic thinking based on the theories of absolute and comparative cost advantages by Adam Smith and David Ricardo, respectively, has argued for a long time that trade liberalisation *always* generates economic growth and benefits *all* trading countries and their populations. Simply put, free trade brings comparative advantage, which trigger specialisation. This increasing specialisation results in economies of scale, which in turn increase consumer welfare.[4] However, this mantra has been increasingly challenged in past years. Public opinion is also increasingly critical of this basic assumption. Ever more production, trade, and hence consumption simply not sustainable.[5]

The increased politicisation of EU trade and investment deals has created persistent negotiation and ratification difficulties.[6] At the same time, bilateral agreements have become more important for the EU due to the weaknesses of the WTO regime.

In order to solve these ratification difficulties, the EU Commission has started to deploy a new strategy, which we call *treaty-making by afterthought*. The Commission, jointly with the other party or parties to a trade and/or investment agreement, draws up 'joint (interpretative) instruments' to support agreements that encounter public criticism.

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[2] Generally: Dani Rodrik, 'Has Globalization Gone Too Far?' (1998) 41 Challenge 81; on EU agreements: Demy van 't Wout, 'The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements' (2022) 20 Asia Europe Journal 81; Jan Orbie et al, 'Promoting sustainable development or legitimizing free trade? Civil society mechanisms in EU trade agreements' (2016) 1 Third World Thematics 526.

[3] Laurens Ankersmit, 'The EU's strategy for more "rules-based" trade and the EU's withdrawal from the Energy Charter Treaty' (2023) Legal Issues of Economic Integration (editorial).

[4] GATT, Trade Policies for a Better Future: Proposals for action (GATT 1985); Milton Friedman, 'The Case for Free Trade' (1997) 4 *Hoover Digest*; see critically for a more elaborate discussion and references Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73.

[5] United Nations, *Sustainable development goals: goal 12* <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/> accessed on 3 April 2023; European Commission, A new Circular Economy Action Plan For a cleaner and more competitive Europe COM/2020/98 final.

[6] TTIP; CETA; EU-MERCOSUR. See e.g. Niels Gheyle and Julia Rone, "The Politicisation Game": Strategic Interactions in the Contention over TTIP in Germany' (2022) German Politics <https://doi.org/10.1080/09644008.2022.2042517> accessed 24 April 2023; Francesco Duina, 'Why the excitement? Values, identities, and the politicization of EU trade policy with North America' (2019) 26 Journal of European Public Policy 1866.

This new category of joint statements, drawn up like afterthoughts, months, sometimes years after the conclusion of the actual negotiations, are, however, not a solution and dressed up as more than they are. While legally they are of interpretative value only and cannot amend the treaty text, they are presented as solving the critics' objections to that treaty text. They also call into question the relationship between the EU and the Member States.

Three recent examples have created heated debates: the joint interpretative instruments in relation to CETA,[7] the Decision of the Heads of State and Government on the EU-Ukraine Association Agreement,[8] and the recently leaked 'Joint Instrument' relating to the EU-Mercosur Association Agreement.[9]

This paper focuses on this most recent 'afterthought' to the EU-Mercosur AA, which is available only in an unofficial (leaked) version of February 2023.

II. EU-Mercosur Association Agreement – State of Play

1. Framework

Based on the 1999 Interregional Framework Cooperation Agreement, the EU and the Mercosur states, Brazil, Argentine, Uruguay and Paraguay, (the four founding members of the Common Market of the South (Mercosur)) have aimed to conclude a comprehensive trade agreement for decades.

On 28 June 2019, an 'agreement in principle'[10] was reached between the Parties on the largely negotiated chapters of the free trade agreement (FTA) that forms part of the wider Association Agreement (AA), which had already been agreed in June 2018.[11] This later document, which has not been published and thus is not subject to our legal analysis as such,[12] requires ratification by the EU and Member State, as stated by all sides.

Association agreements find their legal basis in Article 217 TFEU and are almost always concluded as mixed agreements. The Stabilisation and Association Agreement (SAA) with

[7] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 14.1.2017.
[8] Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (Annex to the European Council Conclusions on Ukraine, 15 December 2016)
[9] Joint Instrument, available in its leaked version at: https://friendsoftheearth.eu/wp-content/uploads/2023/03/LEAK-joint-instrument-EU-Mercosur.pdf.
[10] New EU-Mercosur trade agreement: The agreement in principle (Brussels, 1 July 2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en> accessed on 24 April 2023.
[11] See Commission press release on the EU and Mercosur reach agreement on trade of 28 June 2019, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396> accessed on 24 April 2023.
[12] Parts have been made available, inter alia to the German Greenpeace office upon request, but there is no complete text. See https://trade-leaks.org/wp-content/uploads/2020/10/EU-Mercosur_Association_Agreement_Background_And_Analysis.pdf

Kosovo and the EU-UK Trade and Cooperation Agreement (TCA) are the only exceptions.[13] Association is a *specific type of cooperation* between the EU and a third state, not a specific policy field. Article 217 TFEU by its nature covers all fields of EU powers, whether or not previously exercised, and the policy fields and the types of commitments that are included are the result of a negotiation process between the EU (and usually its Member States) on the one side and a third state on the other. Association agreements pursue the *objective* of 'creating special, privileged links with a non-member country'.[14]

Despite the fact that the negotiations had been concluded in 2018/ 2019 and the partners had reached a political agreement, Emmanuel Macron, President of France, and other leaders from Ireland, Luxembourg, the Netherlands and Austria called for changes or even a 'complete revision'.[15]

The agreement in principle (dated 1st July 2019, available on the COM website[16]) is decreed 'not a legal text'.[17] The text of the FTA, once ratified, would be an international treaty, and would be concluded by the EU and as such legally binding on both the EU and its Member States.[18] These chapters of the FTA as a whole as published by the Commission would most likely pass the Court of Justice's test of being sufficiently 'trade-related'.[19] The FTA/trade part of the EU-Mercosur agreement could thus qualify for EU-only conclusion and would not require a mixed agreement. The mixed agreement requires, besides conclusion by the Union, ratification in the 27 Member States, pursuant to their own constitutional rules. This renders the process necessarily more time-consuming and cumbersome. It also makes the political opposition mentioned above constitutionally more relevant, namely not only as a counter voice in the Council but as a potential veto of national parliaments.

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[13] See: Christina Eckes & Päivi Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?', MLR 2021; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ (2016) L 71/3. See on the Kosovo SAA: P. van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' (2017) 22 *European Foreign Affairs Review* 393.

[14] Case 12/86 *Demirel* ECLI:EU:C:1987:400 at [9].

[15] Luciana Ghiotto and Javier Echaide, *Analysis of the agreement between the European Union and the Mercosur* (Powershift 2019) <https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf> accessed 24 April 2023, 6.

[16] New EU-Mercosur trade agreement: The agreement in principle (Brussels, 1 July 2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en> accessed on 24 April 2023.

[17] Ibid, citation from the official document.

[18] Article 216 TFEU.

[19] See for the very wide interpretation of the EU's Common Commercial Policy (CCP) competence post-Lisbon: Case C-414/11 *Daiichi Sankyo* ECLI:EU:C:2013:520; Case C-114/12 *European Commission v Council of the European Union* (*Broadcasting Rights*) ECLI:EU:C:2014:224; Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376.

If ratified, the FTA would establish the largest free trade zone the EU has ever created, covering over 780 million people, eliminating customs duties on 91% of EU goods exports to Mercosur. In turn, Mercosur would remove import duties on industrial products from the EU such as cars, car parts, machinery, chemicals, clothing, pharmaceuticals, leather shoes, and textiles.

The Commission has conducted an external sustainability impact assessment[20] which was only completed after the Chapters were negotiated in detail and, also after the Agreement in Principle on the Association Agreement.

Neither the AA (which is unknown in terms of the actual content), nor its trade part (the FTA as published on the Commission website) have entered into force, but the ratification process has now been picked up since Luiz Inácio Lula da Silva won the 2022 Brazilian elections. At this point, neither the European Parliament nor the Member States' Parliaments have ratified the agreements. A current final text is not available, the process of 'legal scrubbing', i.e. the process of legal revision, is not complete.[21]

As was reported, the Commission initiated splitting the agreement in an EU-only and a mixed agreement part This would pull apart the trade provisions (EU-only) from the more 'political part' covering institutional cooperation and human rights commitments, which would have to be adopted as a mixed agreement and hence require ratification by all national (and some regional) parliaments.[22] This seems to be intended to ensure smooth ratification by side-lining (potential) national opposition.[23] This, however, is problematic as it isolates the economic provisions from the political commitments, including those to protect human rights for example in the process of production of the goods that are then traded. Moreover, as stated above, while parts of the FTA are publicly available, the 'political part' on which the parties reached agreement on 18 June 2020, the AA, has not yet been publicly shared, which

[20] Max Mendez-Parra et al, *Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur* (LSE Consulting 2020) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/abfa1190-59d1-4f59-93a5-9b9810d2b744/details> accessed 24 April 2023.

[21] New EU-Mercosur trade agreement: The agreement in principle (Brussels, 1 July 2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en> accessed on 24 April 2023.

[22] Barbara Moens and Jakob Hanke Vela, 'Brussels looks to evade EU capitals to get Mercosur deal done' (*Politico* 28 September 2022) <https://www.politico.eu/article/brussels-eu-commission-grab-trade-power-mercosur-deal/> accessed on 24 April 2023.

[23] The French government has been critical of the agreement for a long time (see e.g. 'France will not sign up to Mercosur deal at any price: ministers' (*Reuters* 2 July 2019). In March 2023, the Dutch parliament called on the Dutch government to block the agreement (see Rein Wieringa, 'Tweede Kamer stemt tegen Mercosur-verdrag: "oneerlijke concurrentie voor Europese boeren"' (*NRC* 7 March 2023)). In the same month, the Austrian Agriculture Minister made clear he opposes the agreement (Chiara Swanton, 'Austrian agriculture minister says "no" to Mercosur deal amid industry pressure' (*Euractiv* 21 March 2023).

means that public and parliamentary debate in the Member States cannot refer to any actual text apart from the FTA.[24]

This paper only looks at the trade part of the agreement (FTA). In 2023, it became clear that the Commission would propose an additional text to the FTA, the Joint Instrument. The Joint Instrument relating to the EU-Mercosur Agreement was leaked. Officially, neither the European Parliament nor national parliaments have access to its text.

2. Criticism of the FTA/AA

Civil society groups[25] as well as scientific studies[26] have found that the FTA would most likely, *inter alia*

- foster large-scale deforestation
- lead to an expansion of agricultural land in the Mercosur countries, and increasing meat production
- ease the export of passenger cars and other products making it difficult for countries worldwide to meet climate targets.
- endanger human rights

Overall, it would endanger both the implementation of the 2015 Paris Agreement and the aims of the Convention on Biological Diversity, in particular the 2022 Global Biodiversity Framework.

The EU Commission has tried to counter these arguments and insists that the FTA would be beneficial and help to implement international environmental law and the UN Development goals.

It has also argued that the impacts raised by civil society are now also mostly managed through the new Forest Product Regulation[27] which has been agreed by the European

[24] See for example the debate in the German Bundestag of 26. January 2023, available here: https://www.bundestag.de/dokumente/textarchiv/2023/kw04-de-mercosur-930076. With an intervention by Sebastian Roloff (SPD) emphasising that splitting the AA into a trade and non-trade part is not desirable (at 3:30 min) and that the obligation relating to environmental and climate protection should be subject to sanctions (at 5 min), available here: https://www.bundestag.de/mediathek?videoid=7550354#url=L21lZGlhdGhla292ZXJsYXk/dmlkZW9pZD03NTUwMzU0&mod=mediathek.

[25] Thomas Fritz, *EU-Mercosur-Abkommen: Risiken für Klimaschutz un Menschenrechte* (Greenpeace/Misereor 2020) <https://www.greenpeace.de/publikationen/greenpeace-misereor-dka-studie-eu-mercosur-abkommen-0620.pdf> accessed 24 April 2023.

[26] Luciana Ghiotto and Javier Echaide, *Analysis of the agreement between the European Union and the Mercosur* (Powershift 2019) <https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf> accessed 24 April 2023.

[27] European Commission, Proposal for a regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest

Parliament only on 20 April 2023. Yet, - aside from only establishing a system of due diligence obligations for affected companies – this Regulation excludes Mercosur core produce such as corn, sugar cane, rice, poultry, and ethanol.

In contrast, legal analysis shows that Member States such as Germany do have an obligation under its Basic Law (Grundgesetz, GG) not to enter into agreements that might lead to further deforestation.[28] Indeed, as explicitly stated by the German Constitutional Court, 'Art. 20a GG requires the state to globally coordinated conduct to protect the global climate (…).'[29]

3. Trade and Sustainable Development (TSD) Chapter

The Agreement in Principle includes a chapter on Trade and Sustainable Development (TSD), and this 18-Article long chapter has been used by the Commission and others to deflect criticism of the EU-Mercosur Agreement as a whole.

The Agreement in Principle states:

> "The Trade and Sustainable Development (TSD) chapter lives up to the highest standards for chapters in other modern agreements such as those with Mexico or Japan. The basis is the premise that increased trade should not come at the expense of the environment or labour conditions. On the contrary, it should promote sustainable development.
>
> The Parties agree that they should not lower *labour or environmental standards* in order to attract trade and investment. They also agree that the trade agreement should not constrain their right to regulate on environmental or labour matters, including in situations where scientific information is not conclusive"

The topics of the TSD chapter, which would become legal text should the FTA be ratified and enter into force include:

> Article 4: Multilateral Agreements of Labour Standards
> Article 5: Multilateral Environmental Agreements
> Article 6: Trade and Climate Change
> Article 7: Trade and Biodiversity
> Article 8: Trade and Sustainable Forest Management

degradation and repealing Regulation (EU) No 995/2010, COM(2021)706; EU-Regulation on Deforestation-free Supply Chains (EP(2023)000229) – not in force.

[28] https://www.bundestag.de/resource/blob/944196/79297f163b8e8cd97f14d9a236b81b90/Stellungnahme_Holterhus-data.pdf.

[29] BVerfG, Neubauer et. al., Order of 24th March 2021, 1 BvR 2656/18 u.a., margin no. 201.See in depth on this obligation: Verheyen/Markus, Umweltvölkerrecht, in Koch (Hrsg) Handbuch Umweltrecht, 2023.

Article 9: Trade and Sustainable Management of Fisheries and Aquaculture
Article 10: Technical and Scientific Information
Article 11: Trade and Responsible Management of Supply Chains

Under Art 6 for example, Parties commit (again) to the Paris Agreement on Climate Change.

Yet, the clause does not bind Brazil or other Mercosur states over what is already binding international environmental law, and it does not include enforceable mechanisms in this regard. Art 15.5 specifies: "No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter". Rather, Art 14 of the TSD Chapter establishes a "Sub-Committee on Trade and Sustainable Development" tasked "to facilitate and monitor the effective implementation of this Chapter, including cooperation activities undertaken under this Chapter".

Alleviating this criticism was part of the aim of the Commission's initiative which resulted in the Joint Instrument, also because the current analysis of the Association Agreement text (as incomplete as it is available) shows that sanctions or enforcement of these obligations are not addressed there, either.

> "Although climate and environmental issues are mentioned in the document, they are afforded a comparatively weak legal status. The treaty does not consider environmental protection or climate protection to be an 'essential element', i.e. a principle on which sanctions can be applied. This is significant, because if one party is in breach of an essential element, the other party is entitled to take immediate appropriate measures, even to the extent of a partial or full suspension of the agreement. The essential elements in the text include: respect for democratic principles, human rights and the rule of law …"[30]

The EU Commission had, in fact, committed to use trade sanctions in case of violations of commitments made under the Paris Agreement.[31] Overall, it is no surprise that this chapter does not require a break with the economic growth mantra. All of the trade enhancing measures for products remain intact.[32]

[30] https://trade-leaks.org/wp-content/uploads/2020/10/EU-Mercosur_Association_Agreement_Background_And_Analysis.pdf
[31] See the Commission communication of 22 June 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921.
[32] See on all of this: Jessica C Lawrence, 'The EU in the Mirror of NPE: Normative Power Europe in the EU's New Generation Trade and Investment Agreements' in C Nagy (ed) *Studies in European Economic Law and Regulation* (Springer 2020).

III. The MERCOSUR Joint Instrument

1. Content

The Commission's mandate to negotiate the Mercosur-EU Association stems from 1999 – much has changed since. To manage both MEP, Member State and civil society opposition, the EU Commission has launched attempts to persuade Argentina, Brazil, Paraguay and Uruguay to sign a supplementary declaration to the FTA. The declared objective of the EU-Mercosur Joint instrument was to strengthen the sustainability commitments under the EU-Mercosur deal beyond the TSD chapter, including enforcement (see above).

Supposedly, the leaked document was to be discussed at a joint meeting in mid-April, which was then postponed.[33]

The document is entitled "EU-Mercosur Joint Instrument DRAFT - SENSITIVE Version of February 2023" and has only 9 pages, referring first to the

> "need to take urgent action to tackle the triple planetary crisis of climate change, biodiversity loss and pollution, as clearly pointed out by the most recent scientific evidence, including the Sixth Assessment Report of the IPCC published in August 2021, the 2019 IPBES global assessment report on biodiversity and ecosystem services, the 2022 Global Land Outlook and the IRP Global Resources Outlook 2019;"

Its intent is summarised as follows:

> "This joint instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a statement of what Mercosur and the European Union agreed in a number of provisions under the EU-Mercosur Agreement that have been the object of public debate and concerns and an agreed interpretation thereof."

It refers back to the agreed topics in the various chapters of the draft FTA, and in particular to the TSD Chapter, reiterates and details some of the obligations in the legal text. The text is in fact far more detailed than the agreed text in the TSD Chapter, as this comparison of the Climate Change Part shows:

[33] 'EU und Mercosur ringen um Klimaschutz-Zusagen' (*TABLECLIMATE* 20 April 2023) < https://table.media/climate/analyse/eu-und-mercosur-ringen-um-klimaschutz-zusagen/> accessed 24 April 2023

Art. 6 of the TSD Chapter in the FTA	Joint Instrument (leaked)
1. The Parties recognise the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end. 2. Pursuant to paragraph 1, each Party shall: (a) effectively implement the UNFCCC and the Paris Agreement established thereunder; (b) consistent with article 2 of the Paris Agreement, promote the positive contribution of trade to a pathway towards low greenhouse gas emissions and climate-resilient development and to increasing the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production. 3. The Parties shall also cooperate, as appropriate, on trade-related climate change issues bilaterally, regionally and in international fora, particularly in the UNFCCC.	The commitment in Article 6.2 of the TSD Chapter and Article 29 of the Political and Cooperation chapter to effectively implement the UNCCC and the Paris Agreement in line with the best available science includes: Timely communication and implementation of successive and progressive Nationally Determined Contributions (NDCs) reflecting the highest possible ambition, in accordance with Art. 4.2 and 4.3 of the Paris Agreement, and that therefore there will be no reduction in the level of ambition of each Party's NDC, including with respect to deforestation targets existing on 28 June 2019, i.e. the date of the political agreement on the EU-Mercosur text, and as reflected in each Party's national laws; Pursuit of domestic mitigation measures, with the aim of achieving the objectives of such NDCs, in accordance with Art. 4.2 of the Paris Agreement; Engagement, as appropriate, in adaptation planning processes and the implementation of actions, in accordance with Art. 7.9 of the Paris Agreement, with the aim of contributing to the global goal on adaptation established in Article 7.1 of the Paris Agreement; Submission and periodical update of an adaptation communication, in accordance with Article 7.10 of the Paris Agreement;

	Submission of long-term low greenhouse gas emission development strategies, in accordance with Art. 4.19 of the Paris Agreement, and timely implementation thereof; Legislative, regulatory and policy action aiming at making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, in accordance with Art. 2.1.c. of the Paris Agreement; Reflection of the best available science in all aspects of implementation; Updating and enhancing actions and support to the Paris Agreement objectives and goals by taking into account the outcome of the periodical global stocktake, in accordance with Articles 4.9 and 14 of the Paris Agreement; Any further decisions made by the governing bodies of the UNFCCC and the Paris Agreement. Recalling the objective in Article 1 of the TSD Chapter of integrating sustainable development in the Parties' trade and investment relationship, information submitted by each Party to the UNCCC Secretariat under Art. 13 of the Paris Agreement will be taken into account in the monitoring of progress in effective implementation of the Paris Agreement in Article 6 of the Trade and Sustainable Development Chapter of the EU - Mercosur Agreement

Overall, the text suggests that indeed new obligations are meant to be added to the TSD chapter, or in the reverse: It demonstrates that the Commission does not see the current provision in the TSD as fit to meet its own aims.

Assuming the above text would become part of the TSD Chapter, all the detailed provisions, which are mostly not trade-related (stock take, NDC monitoring), would become subject to the TSD Committee's remit. If they stay in a separate Joint Instrument, which does not foresee monitoring by the TSD Committee and the treaty status of which is questionable, this would not be the case.

While the MERCOSUR Partners apparently rejected the document outright, some internal critics deem it too modest, in particular since any form of enforcement regime to the TSD Chapter is missing.[34]

The Joint Instrument contains a final section on 'monitoring and review', but that section only refers to the TSD Committee and states rather vaguely that some joint action is necessary:

> "The Parties agree that to ensure an effective implementation of TSD commitments they will develop a roadmap towards meeting these commitments and put in place a series of actions and cooperation activities."

The lack of a sanctions mechanism in particular does not meet the objectives of the EU's own 2022 strategy, which committed to use trade sanctions in case of violations of commitments made under the Paris Agreement.[35]

2. Legal Significance

Neither the EU-Mercosur AA nor its FTA part are in force. The Joint Instrument is meant to counter actual and potential political opposition in the EU and in a number of Member States and the avoid ratification problems comparable to those in the contexts of CETA and the EU-Ukraine AA. However, the Member States are not actually at the table, nor would they be legally involved in this "afterthought".

Against this background it is worth examining the significance of the join instrument for the scope, content, and interpretation of rights and obligations under the EU-Mercosur AA, including the trade part (FTA).

a. Joint (Interpretative) Instruments – It is in the Name

The use of 'instrument' both in the CETA Joint Interpretative Instrument and the EU-Mercosur Joint Instrument appear to indicate the parties intended to draft an act with legal

[34] See Fn. 33.
[35] See the Commission communication of 22 June 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921.

effect. The name of a document does not determine the juridical status.[36] Yet, the name of any document may count as an indication of the intention of state(s).

Public international law knows unilateral declarations and reservations.[37] It also knows bilateral, multilateral, or plurilateral[38] amendments. The term 'instrument' is used in the VCLT in Article 2(1)(a) to refer to a single or several parts of an international treaty: '"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

Other (unilateral or joint) documents, such as statements, precisely are not called 'instrument' in the terminology of international law. Joint statements are less 'synallagmatic' and bilateral than agreements. Usually, the use of 'statement' element means to indicate that it is about a unilateral act (albeit collectively with others) and precisely not an extension of the treaty.

Hence, when documents are called 'joint interpretative instrument' or 'joint instrument' they seem to indicate treaty value. The use of 'interpretative' should be rightly used in the case of CETA as indicating that the aim is not modification (change in legal obligations) but only clarifying, declaratory of what legally already exists.

States sometimes use semantic elements on purpose to make an act sound as if it is a treaty (modification) or as if it is *not* a treaty, while the act actually amounts to a modification. Decisive is the substance of the act, not its denomination. Masking reservations as 'declarations' is an old trick in treaty-making, which states almost always get away with for lack of a centralized authority that can decide. A rare exception is for example the *Belilos* case, in which the European Court of Human Rights exposed Switzerland as using this trick.[39] Normative fuzziness also results in practice from some Conference of the Parties (COP) and Meeting of the Parties (MOP) 'decisions' under existing treaty frameworks, when they amount (content-wise) to a modification of the treaty under which they take place but will not involve the parties' parliaments (no ratification).

In the context of the 'EU Mercosur joint instrument' the denomination as 'instrument' is a suggestive choice that recalls the notion 'legal instruments', *i.e.*, tools to generate some kind of legal effect. It makes the act sound powerful. A similar choice was made in 2016 for the 'joint interpretative instrument' regarding CETA (see discussion below).

[36] See Definition in Art 2(1)a VCLT. Exchanges of letters or notes can be a way to express consent to be bound (see also art 13 VCLT (exchange of notes)).
[37] Reservation within the meaning of Article 2(1)(d) VCLT.
[38] This term is used in the context of mixed agreements, where the EU and the Member States are one party to an international agreement with third parties.
[39] ECtHR, *Belilos*, Application number 10328/83.

The parties generally refer to Article 31 VCLT (General rule of interpretation) and state that the EU-Mercosur Joint Instrument is a 'statement of what Mercosur and the European Union agreed in a number of provisions under the EU-Mercosur Agreement that have been the object of public debate and concerns and an agreed interpretation thereof.'[40]

Only Article 31(2) VCLT on the contextual interpretation appears to be relevant here. Art 31(1) VCLT concerns good faith interpretation. Art 31(3) concerns, next to relevant rules of international law, *subsequent* agreements and practices. A joint statement at the moment of or before conclusion of the treaty (as is the case here) does not qualify as 'subsequent'. Article 31(2) VCLT reads:

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any *agreement* relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any *instrument* which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 31(2)(a) refers to 'any agreement' between 'all the parties'. The EU and Mercosur could be understood to be all the parties to the FTA/trade part of the EU-Mercosur AA, as the Member States are not competent for the trade part. Yet, the Member States are of course parties to the mixed agreement, i.e. the AA. In addition, adopting an additional 'agreement' in the legal sense would require negotiation and involvement of parliaments via conclusion (EU)/ratification (states).

Article 31(2)(b) refers to 'any *instrument*' made by 'one or more parties' and 'accepted by the other parties'. In other words, *not all parties* to the agreement. Yet, the EU-Mercosur Joint Instrument only relates to the trade part to which the Member States are not parties. An 'instrument' under Article 31(2)(b) formally qualifies as a tool of interpretation, but does not require all parties to join.

It is normatively unclear whether the Joint Instrument would require involvement of (at least) the EU Parliament, i.e., adoption pursuant to internal rules in Article 218 TFEU. Arguably the substance of the act should be determinative. If it modifies the rights and obligations under the treaty, conclusion and ratification should be ensured. As stated above, we argue this to be the case (albeit not in a manner to rectify existing substantive criticism of the FTA / AA) .

[40] The Joint Interpretative Instrument relating to CETA contains the same reference to Article 31 VCLT.

b. Context and Comparable Documents

Adopting interpretative documents post closure of political agreement and/or negotiations has become more frequent. There are at least three contexts in which interpretative instruments were concluded to save the respective international agreements, i.e., to allow ratification against the backdrop of political concerns relating to actual and potential scenarios of consequences of the conclusion of these agreements: The CETA saga in Wallonia (2016), the German CETA ratification (2022) and the Dutch ratification of the EU-Ukraine Association Agreement (2016) are illustrative examples.[41] All interpretative documents in these three contexts attempted to narrow the scope for interpretation to disperse political concerns. They all have very limited legal effects.

For these three examples, variations in outcome can be observed.

CETA is a recent example where many statements were drafted after the negotiations had closed.[42] Based on a German initiative the EU Commission, together with the Canadian authorities, drafted it to accommodate some of the criticism raised against the conclusion of the CETA. Its main objective was to strengthen the sustainability commitments under CETA. The Joint Interpretative Instrument aims to give 'a clear and unambiguous statement of what Canada and the EU and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof.'[43] The Contracting Parties and the members of the CETA Investment Court will have to take the Joint Interpretative Instrument into account when interpreting CETA. However, this is window dressing failing to offer a new approach that could *substantively* counter any of the underlying concerns.[44] Even if the CETA Joint Interpretative Instrument (which is also not in force) amounts to a primary source of interpretation under Article 31 VCLT[45] its content has widely been assessed as insufficient to address the concerns that it set out to address and its language as overly vague and unable to amount to a modification.[46]

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[41] Niels Gheyle, 'On a side note: The role of interpretative instruments in defusing deadlocked EU international agreements' (March 2023 preprint) <dx.doi.org/10.13140/RG.2.2.24249.03688> accessed 24 April 2023.
[42] G van der Loo, 'CETA's signature: 38 statements, a joint interpretative instrument and and uncertain future' (*CEPS* 31 October 2016) < https://www.ceps.eu/ceps-publications/cetas-signature-38-statements-joint-interpretative-instrument-and-uncertain-future/> accessed 24 April 2023; W.Th. Douma, 'CETA: Gold Standard or Greenwashing?' in W. Th. Douma, C. Eckes, P. Van Elsuwege, E. Kassoti, A. Ott, & R. A. Wessel (eds), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021).
[43] Recital 1 (e) Joint Interpretative Instrument.
[44] G van Harten, 'The EU-Canada Joint Interpretative Declaration/Instrument on the CETA: Updated Comments', Osgoode Hall Law School Legal Studies Research Paper Series 13(2) (2017). See specifically for labour standards: Franz Christian Ebert, 'The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 295.
[45] Confirmed in Art. X of the Joined Interpretative Instrument and several Statements of the Council.
[46] van Harten, fn 33.

A similar solution of adopting a treaty afterthought was found to solve the ratification difficulties arising from the negative Dutch referendum on the Association Agreement between the European Union, its Member States, and Ukraine in 2016.[47] The Dutch voted against approving the EU-Ukraine AA and the national Government decided that they could therefore not ratify the AA as earlier negotiated. One should note that this does not directly affect the provisional application of the AA, which could *legally* continue indefinitely. Politically, the Dutch ministry of foreign affairs acknowledged that this would be undesirable even if the provisional application only covers the parts of the mixed AA that fall under Union competence (and hence not those parts that require ratification by the Member States, including the Netherlands).[48]

The solution proposed was a "Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council", which would contain a particular interpretation of the AA. The Dutch scholar *Wessel* concludes that 'the Decision is legally unharmful as it does not create rights or obligations that are not yet part of the Agreement';[49] yet, he also points out that situations where some of the parties to an international treaty adopt 'binding' interpretations after the finalization of the text and after most parties had already approved that text are undesirable from a democratic legitimacy perspective.

The Council's legal service argued that the decision has the 'legal force in order to *exclude*, as among the Member States of the EU, *certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis*' and that the Court of Justice could use the decision 'in its reasoning to *assess the intentions of the EU Member States* as to the scope of the commitments undertaken when becoming parties.'[50] The Council's legal service also referred to the decision 'as an *instrument of*

[47] Association Agreement of 21 March 2014 between the European Union and its Member States of the one part, and Ukraine, of the other part <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29> accessed 24 April 2023. The referendum concerned in fact the national Approval Act that ratified, for the Netherlands, the elements of the 'mixed' EU-Ukraine Association Agreement that fall under Member States' competences. See for more details: RA Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' (2016) 1 European Papers 1305; P van Elsuwege, 'The ratification saga of the EU-Ukraine Association Agreement: some lessons for the practice of mixed agreements' in Lorenzmeier et al (eds) EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood (Springer 2021); G van der Loo, 'The Dutch Referendum on the EU-Ukraine Association Agreement: Legal Implications and Solutions' in M Kuijer and W Werner (eds), *Netherlands Yearbook of International Law* (T.M.C. Asser Press 2017).

[48] With regard to CETA, the Council explicated that the EU would terminate provisional application if any one Member States could not ratify the agreement, see: Council of the European Union, Statements to be entered in the Council minutes (13463/1/16 REV 1) <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf> accessed 24 April 2023, 14.

[49] RA Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' (2016) 1 European Papers 1305, 1308.

[50] European Council, Opinion of the Legal Counsel, Brussels, 12 December 2016 (OR. en), EUCO 37/16, LIMITE, JUR 602; www.bnr.nl.

international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound' despite the fact that the act is not concluded pursuant to 'the formalities generally needed for self-standing agreements'.[51] This confirms in no unclear words the intention to adopt an 'agreement-like' act without following the ratification procedures required under national constitutional law, which are usually meant to protect the involvement of national parliaments and sometimes even require referendums.

However, as with the other 'afterthought instruments' discussed in this paper, the real issue is whether such a decision of the heads of state or government can alter the meaning or scope of the agreements to which they relate. In the case of the decision of the heads of state and government, the conclusion is clear. It is not a reservation. It cannot result in amending the scope or content of the EU-Ukraine AA as concerns the Member States. It is also only an expression of an agreed interpretation of the AA between the Member States, not the EU or Ukraine, which did not participate in the adoption of the decision but are parties to the AA.

In short, a decision of the heads of state and government cannot alter or amend any part of the AA;[52] nor can it – unless the EU and Ukraine agree – create even a binding means of interpretation within the meaning of Article 31 VCLT.[53] It should be noted that this latter point distinguishes the decision in the context of the EU-Ukraine AA from the Joint Interpretative Instrument relating to CETA and the Joint Instrument relating to the EU-Mercosur AA.

V. Conclusion on the Joint Instrument

First, the EU-Mercosur Joint Instrument substantively amounts to an amendment/modification of the FTA and should as such be adopted pursuant to ordinary rules of treaty-making within the meaning of Article 218 TFEU (and relevant national constitutional provisions):

The Joint Instrument is – on its surface – a text intended to clarify the intentions of all the parties to the trade agreement/trade part of the overall AA, namely the Mercosur countries and the European Union – not the Member States, which are not party to the FTA/trade part. It gives additional context, adds more details than the agreed text in the TSD Chapter,

[51] Ibid.

[52] See on this point also: Opinion of Advocate General Saggio, Case C-149/96 (Portugal v Council), ECJ, ECR I-08395, 25 February 1999 and the judgment of the International Court of Justice, Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad), ICJ, Judgment, 3 February 1994.

[53] See also P van Elsuwege, 'The ratification saga of the EU-Ukraine Association Agreement: some lessons for the practice of mixed agreements' in Lorenzmeier et al (eds) EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood (Springer 2021).

clarifies more specific obligations, and provides additional elements that again require further interpretation.

A close reading of the Joint Instrument reveals that the EU Commission appears to assume the agreed TSD Chapter is insufficient to uphold the spirit and intent of the Green Deal. This becomes apparent both in the general introductory remarks on the triple planetary crisis but also in the more detailed obligations, e.g., relating to the NDCs.

The join instrument, while being part of an overall pro-trade framework, contains a detailed and strengthened commitment by the parties to the Paris mechanism of formulating progressively NDCs that strengthen national climate action, including explicitly on deforestation.[54] It for example requires compliance with best available science and links to the monitoring mechanism of the progress in effective implementation of the Paris Agreement in Article 6 of the TSD Chapter with submissions to the UNFCCC Secretariat under Art. 13 of the Paris Agreement. While the mechanism remains in line with the bottom up, party submission dependent procedures under the Paris Agreement, the more detailed commitments should be seen as connecting the EU-Mercosur AA closely with the monitoring under the Paris Agreement.

Since the content of the EU-Mercosur Joint Instrument substantively amounts to more than a clarification of existing obligations, it is a modification, and the parties should consult their parliaments.

The only plausible way forward to ensure that the Joint Instrument forms part and parcel of the FTA agreement and expressly and transparently adds to and amends the scope and content of the FTA would be to integrate the content into the set of 'instruments of international law' by making part of the further conclusion process, including legal scrubbing, etc.

Adopting an additional text without the formal status of a legal instrument with legal effects, i.e., treaty character, which substantively amends and extends the obligations of the parties circumvents the ordinary ratification/conclusion processes and hence curtails the involvement of parliaments. It is also misleading. Therefore, it would be the more effective and more transparent option to give the Joint Instrument the status of an agreement, i.e., treaty law, under Article 31(2)(a) VCLT.

[54] See table above in Section III.1.

Second, the Joint Instrument falls short of what the Commission itself wants to achieve:

The text of the Joint Instrument falls short of the Commission's own strategy.[55] As Audrey Changoe of Friends of the Earth Europe concluded, the joint instrument includes 'no new measure included that will address issues of deforestation, climate change, human rights violations, or animal welfare'.[56] The evaluation by Friends of the Earth criticises above all that, the contradiction between abstract targets and the overall framework aimed at increasing economic exchanges. On the one hand, the joint instrument sets out a commitment to the NDCs that were set in June 2019 and a 50% reduction in current deforestation levels by 2025; on the other, it is an interpretative tool for a free trade agreement that has the objective of intensifying trade between the two blocks, including the import of poultry and soy from Mercosur to the EU, which is one of the driving forces of deforestation.

In particular, the lack of serious enforcement structures does not meet the Commission's own ambitions to reconcile trade with sustainability. NGOs have expressed their disappointment in the Joint Instrument and pointed out that it is not capable of make the needed changes to the EU-Mercosur FTA that could resolve the environmental, climate and health threats.[57]

Third, the Agreement does not resolve any ratifications issues with the AA:

The EU proposes additional obligations in terms of climate actions that go further than the text of the TSD Chapter/FTA but does not actually involve Parliaments – neither the European Parliament nor national parliaments. The status of the Joint Instrument remains unclear, as does its potential impact on any Association Agreement. The approach does not address the pressing issue of convincing national Parliaments, which would presumably require involving them.

[55] Ignacio Arróniz Velasco and Jonny Peters, 'The EU-Mercosur joint instrument fails to pass the EU's own sustainability' (*E3G* 5 April 2023) <https://www.e3g.org/news/the-eu-mercosur-joint-instrument-fails-to-pass-the-eu-s-own-sustainability-tests/> accessed 24 April 2023; Mathilde Dupré and Stéphanie Kpenou, 'EU-Mercosur: a draft interpretative declaration that resolves nothing' (*Institut Veblen* 23 March 2023) <Institut Veblen - EU - Mercosur: a draft interpretative declaration that resolves nothing> accessed 24 April 2023.
[56] 'Breaking: Civil society denounce leaked joint instrument on EU-Mercosur deal as blatant greenwashing' (*Friends of the Earth Europe* 22 March 2023) <https://friendsoftheearth.eu/press-release/breaking-civil-society-denounce-leaked-joint-instrument-on-eu-mercosur-deal-as-blatant-greenwashing/> accessed on 24 April 2023.
[57] Institut Veblen - EU - Mercosur: a draft interpretative declaration that resolves nothing; E3G - The EU-Mercosur joint instrument fails to pass the EU's own sustainability tests; Friends of the Earth Europe - Breaking: Civil society denounce leaked joint instrument on EU-Mercosur deal as blatant greenwashing; Fern - Still got it! As discussions aimed at ratification begin, Mercosur deal retains its capacity to dismay.

Fourth, the question of legality must be asked: Can the EU really conclude alone (*i.e.*, without the Member States) such detailed agreement on obligations relating to communication and implementation of climate action, e.g., emission reduction?

The relationship between EU competence and mixed competences is complicated. Generally, international agreements that go beyond the exclusive EU competence for trade, such as for example environmental agreements are concluded as mixed agreements. The Court of Justice has interpreted the EU's competence for the Common Commercial Policy (CCP) very generously, including a wide range of 'trade-related' matters.[58]

However, the Joint Instrument is a separate 'afterthought' to the original trade part/FTA. It explicitly and nearly exclusively aims to achieve *non-trade objectives* by strengthening among other things environmental and climate change obligations in a way that does not justify categorizing these issues as trade-related. This raises the question of whether treaty-making by afterthought allows the EU to conclude non-trade 'instruments' that contain additional obligations in a way that is legally binding on the EU and by extension the Member States.

From an EU law perspective, Article 216 (2) TFEU provides that agreements concluded by the Union are directly binding on the EU institutions and the Member States. Any joint instrument that forms an integral part of an international agreement concluded by the EU would also be covered by Article 216(2) TFEU. Concluding the Joint Instrument as part of the overall treaty and in a procedure involving parliaments, erases normative doubts about its status and effectiveness within the EU legal order.

Based on these four conclusions, even if the Joint Instrument is adopted by the EU and the current Mercosur Parties, it is entirely possible that the EU Mercosur Agreement as a whole will not see entry into force – and this applies both to the FTA and the AA.

[58] Case C-414/11 *Daiichi Sankyo* ECLI:EU:C:2013:520; Case C-114/12 *European Commission v Council of the European Union* (*Broadcasting Rights*) ECLI:EU:C:2014:224; Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376.